UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

IN RE: ROBERT A. PONTARELLI (B.K. No. 93-11484-ANV),

DEBTOR

APPEAL OF C.A. No. 98-116T
LAW OFFICES OF EVERETT A. PETRONIO, INC.
FROM A JUDGMENT OF THE UNITED STATES
BANKRUPTCY COURT FOR THE DISTRICT OF RHODE ISLAND

DECISION

ERNEST C. TORRES, Chief United States District Judge.

The Law Offices of Everett A. Petronio, Inc. ("Petronio"), appeals from an order of the Bankruptcy Court, pursuant to 11 U.S.C. § 330, awarding attorneys' fees in an amount less than the amount claimed by Petronio for its representation of Robert A. Pontarelli, a chapter 13 debtor.

BACKGROUND

Most of the relevant facts are undisputed. In January 1993, Pontarelli (the "Debtor") retained Petronio to file a Chapter 13 bankruptcy petition on Pontarelli's behalf. Pontarelli's principal asset was his home, which was valued at $310,000.

During the pendency of the bankruptcy proceeding, Pontarelli's home was destroyed by fire, and the estate's principal asset became a claim under a fire insurance policy issued by Providence Washington Insurance Company.

In May of 1994, Petronio was allowed to withdraw as Pontarelli's counsel due to a breakdown in communication and a lack of cooperation by Pontarelli. Since that time, Petronio has performed no further services in connection with this bankruptcy.

Three weeks after withdrawing, Petronio moved for an award of $16,750.00 in attorneys' fees and $370.68 in expenses (the "Initial Application"). The United States Trustee objected to the requested fees on five grounds:

1. the time records attached to the application are inappropriately "lumped";

2. Petronio billed in increments of 0.25 hours rather than on the basis of time actually spent;

3. much of the time listed is secretarial time which should be treated as overhead that is not chargeable to the bankruptcy estate;

4. given the travel of the case, the amount claimed is disproportionately high; and

5. the fees claimed should be reduced "in light of the multiple drafts of an unconfirmed plan of reorganization and the overall benefit to the estate of the services rendered."

United States Trustee's Objection to Fee Application of the Counsel to the Debtor, dated July 14, 1994.

A hearing on the Initial Application was held on September 1, 1994. At that hearing, Petronio withdrew its request to be compensated for secretarial time, thereby reducing its claim for legal fees from $16,750 to $14,350. Petronio, then, began to argue why its amended fee request should be granted. However, the Bankruptcy Judge determined that the request was premature because the insurance company was resisting payment of the fire loss; and,

therefore, it was not clear whether the estate would have any assets with which to pay a fee. Accordingly, the Bankruptcy Judge recommended that Petronio "not press your application now"; but, rather, that it "wait and see what . . . turns up in the way of recovering on the insurance claim." The Judge also granted Petronio leave to revise its fee application in order to address the Trustee's objections.

Shortly thereafter, Petronio filed an Amended Fee Application (the "Amended Application"), formally deleting the charges for secretarial time and reflecting a credit of $1500 for payments already received, but no action was taken on the Amended Application at that time.

During the ensuing three years, the case was converted from a Chapter 13 case to a Chapter 7 case, and the Trustee settled the fire insurance claim for $431,265.41.

On August 26, 1997, the Chapter 7 Trustee filed his Final Report, which proposed a disbursement to Petronio in the amount of $13,220.68, the amount requested in the Amended Application. The United States Trustee indicated that she had no objection to the Final Report.

In November of 1997, a Notice of Petronio's fee application was sent to all the creditors, the Chapter 7 Trustee, and the United States Trustee. The notice stated that "If no objection/response is filed within [ten days], the Application for Compensation may be acted upon by the Court without further notice or hearing." No objection or response was made and no hearing was

ever held on the application. Instead, on January 5, 1998, the Bankruptcy Judge, after conducting a sua sponte review, determined that "the application suffers from multiple shortcomings, including: (1) .25 minimum billing increments, which ignores the general rule that time should be charged in increments of one tenth of an hour; (2) excessive time per task; and (3) billing $175 per hour for administrative tasks such as filing papers at the Bankruptcy Court." Accordingly, the Bankruptcy Judge entered an Order awarding Petronio only $3000 in fees and $370.68 in expenses.

It is from that order that Petronio appeals.

STANDARD OF REVIEW

In reviewing an order of a bankruptcy court, a district court accepts the bankruptcy judge's findings of fact unless they are clearly erroneous. Conclusions of law, on the other hand, are reviewed de novo. In re Healthco Int'l, Inc., 132 F.3d 104, 107 (1st Cir. 1997); Grella v. Salem Five Cent Savings Bank, 42 F. 3d 26, 30 (1st Cir. 1994). Findings of fact are deemed "clearly erroneous" only where there is a definite and firm conviction that a mistake has been made. Burgess v. M/V Tamano, 564 F.2d 964, 977 (1st Cir. 1977), *quoting* United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). The deference accorded to the bankruptcy court's factual findings is especially applicable to determinations regarding the reasonableness of requested fees, where the bankruptcy court "enjoys particularly great leeway." In re I Don't Trust, 143 F.3d 1, 3 (1st. Cir. 1998).

DISCUSSION

Petronio argues that the Bankruptcy Court's Order does not adequately explain how the fee award was calculated, and that the Bankruptcy Court erred in failing to conduct a hearing before making its award.

1. Adequacy of Explanation

The test for determining whether a bankruptcy court's findings and conclusions are sufficiently detailed to pass muster is whether they permit the reviewing court to ascertain whether the bankruptcy court's order rests on a clearly erroneous perception of the facts or on a misapprehension of the law. See Folger Coffee Co. v. Olivebank, 2000 WL 38459 (5th Cir.). In the context of decisions regarding attorneys' fees, it is sufficient if the order is "specific enough to allow meaningful review . . . " Grant v. George Schumann Tire & Battery Co., 908 F.2d 874,878, n. 10 (11th Cir. 1990). The order need not exhaustively discuss all of the factors customarily considered in making such an award. Nor is the court required to provide a detailed accounting of the calculations on which the award is based. All that is required is a clear indication that the court adequately considered and reasonably applied those factors that are relevant to the case under consideration. See In re Health Science Products, Inc., 191 B.R. 895, 910 (Bankr. N. Ala. 1995).

Here, the Bankruptcy Court's order satisfies those requirements. The order indicates that the Bankruptcy Judge utilized the lodestar approach and considered the factors set forth in Johnson v. Georgia Highway Express, 488 F.2d 714 (5th Cir. 1977). It also explains why the bankruptcy judge departed downward from the lodestar amount (lack of benefit to the estate). Finally, the order enumerates what the Bankruptcy Judge found to be deficiencies in the application and the basis for the reduced

award. Nothing more is required.

2. The Hearing Requirement

Ordinarily, a court is not bound to follow any particular procedure in deciding questions presented to it. All that is required is that the court afford the parties a fair opportunity to present relevant facts and arguments. In re I Don't Trust, 143 F.3d 1, 3 (1st. Cir. 1998).

However, § 330 of the Bankruptcy Code authorizes the Bankruptcy Court to award attorneys' fees only after conducting a hearing. It provides, in relevant part:

> (a) After notice to any parties in interest and to the United States trustee and a hearing . . . the court may award to . . . the debtor's attorney
>
> > (1) reasonable compensation for actual, necessary services rendered by such . . . attorney . . . based on the nature, the extent and the value of such services, the time spent on such services, and the cost of comparable services other than in a case under this title; and
> >
> > (2) reimbursement for actual, necessary expenses.

11 U.S.C. § 330(a) (emphasis added)[1].

The definitions section of the Code provides that:

> (1) "after notice and a hearing", or a similar phrase
>
> > (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but

[1]Section 330 was amended by The Bankruptcy Reform Act of 1994, Pub. L. No. 103-394 (October 22, 1994). However, none of the changes are relevant to the issues presented in this case; and, in any event, this case is governed by the statute as it existed prior to the 1994 amendments. In re Harshbarger, 205 B.R. 109, 112 (Bankr. S.D. Ohio 1996).

> (B) authorizes an act without an actual hearing if such notice is given properly and if --
>
> (i) such a hearing is not requested timely by a party in interest; or
>
> (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act.

11 U.S.C. § 102(1).

Although the Code clearly requires that a hearing be held, a bankruptcy court has broad discretion to determine what kind of hearing may be appropriate under the circumstances. In re Busy Beaver Building Centers, Inc., 19 F.3d 833, 846, fn. 16 (3rd Cir. 1994) ("the anatomy of the hearing lies within the sound discretion of the bankruptcy judge, and would not necessarily require the presentation of oral testimony. For example, the type of hearing which "is appropriate in the particular circumstances" might simply be an oral hearing (whether in court or more informally, as by teleconference) at which the applicant submits argument based on the papers. The essential point is that the court should give counsel a meaningful opportunity to be heard."). All that is required is that "given the nature and circumstances of the case, . . . the parties [must] have a fair opportunity to present relevant facts and arguments to the court, and to counter the opponent's submissions[.]" Aoude v. Mobil Oil Corp., 862 F.2d 890, 894 (1st Cir. 1988).

In this case, it does not appear that Petronio was afforded an adequate opportunity to present its arguments or to address the objections initially raised by the U.S. Trustee. At the hearing on

the Initial Application, Petronio, in an effort to counter one of the Trustee's objections, began by trying to justify the amount of time for which it was seeking compensation. If Petronio had been permitted to complete its presentation, the hearing requirement would have been satisfied. Neither litigants, in general, nor fee applicants, in particular, are entitled to multiple opportunities to present their arguments or to present the court with a "moving target" by continually modifying their requests.

However, Petronio's attempts to justify the requested fee were cut short by the Bankruptcy Judge's determination that the fee application was premature and should not be pressed until it was clear that the estate had assets. Thus, Petronio was not afforded an adequate opportunity to rebut the contention that it devoted an excessive amount of time to the tasks that it performed, which was one of the reasons cited for reducing its fee request.

Nor did Petronio have an opportunity to counter the objection that it had billed for minimum time increments of .25 hours, which was another reason cited by the Bankruptcy Court for reducing Petronio's fee request. The only concern specifically expressed by the Bankruptcy Judge at the September 1, 1994 hearing was the "lumping question[s]" that Petronio attempted to address in its Amended Application by breaking down some of its time entries.

Although the Bankruptcy Court, on behalf of the bankrupt's estate, is entitled to, sua sponte, reduce fee requests, (In re Pothaven, 84 B.R. 579, 583 (Bankr. S.D. Iowa 1988)), the applicant, first, must be alerted to the contemplated action and must be

afforded a meaningful opportunity to respond to the court's concerns. In re Gonzales, 145 B.R. 679, 681 (D. Colo. 1992). Here, that was not done. On the contrary, the Chapter 7 Trustee's proposed disbursement to Petronio of the amount requested in the Amended Application and the U.S. Trustee's failure to object buttress the conclusion that Petronio was unaware that a reduction was being considered.

The U.S. Trustee's failure to object when she received the notice also negates her argument that, under Section 102(1)(B)(i), Petronio waived its right to a hearing by not requesting one. Since Petronio had no reason to believe that its Amended Application was contested, its failure to request a hearing cannot be construed as a waiver.

CONCLUSION

For all of the foregoing reasons, the Order of January 5, 1998, is vacated, and the matter is remanded back to the Bankruptcy Court for further proceedings consistent with this Decision.

IT IS SO ORDERED,

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Ernest C. Torres
Chief United States District Judge

Date: March , 2000